IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 9TH JANUARY 2007 / 19TH POUSHA 1928

WP(C).No. 34626 of 2006(V)

PETITIONER:

N.K. PAVITHRAN, S/O.N.K.KUNJAN,
THURUTHIPALLI HOUSE, CHANGAMPUZHA NAGAR P.O.,
KALAMASSERY, COCHIN-33.

BY ADV. SRI.K.JAGADEESCHANDRAN NAIR

RESPONDENTS:

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1. M. NANDAKUMAR,
COUNCILLOR WARD NO.10, RESIDING AT USHUS,
CHANGAMPUZHA NAGAR, NEAR FATHIMA CHURCH, COCHIN-33
KALAMASSERY MUNICIPALITY, ERNAKULAM DISTRICT.

2. ELECTION COMMISSION,
STATE OF KERALA, CORPORATION OFFICE COMPLEX,
LMS COMPOUND, PALAYAM, TRIVANDRUM-695033.

3. KALAMASSERY MUNICIPALITY,
REPRESENTED BY ITS SECRETARY.

R2 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC,K.S.E.COMM
R1 BY ADV. SRI.K.RAMAKUMAR
SRI.T.RAMPRASAD UNNI
R3 BY ADV.SRI.M.K.ABOOBACKER, SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON ON 09/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.34626/06

APPENDIX

PETITIONER'S EXTS:

EXT.P1 – TRUE COPY OF O.P. 174/04

EXT.P2 – TRUE COPY OF ORDER OF ELE. COMMN. DT.19.12.06

EXT.P3 – TRUE COPY OF PETITION DT.25.12.06.

EXT.P4 – TRUE COPY OF LETTER ACKNOWLEDGED BY MUNICIPAL SECRETARY DT.5.10.2000.

EXT.P5 – TRUE COPY OF MINUTES OF THE MEETING DT.5.10.2000

EXT.P6 – TRUE COPY OF MINUTES OF THE MEETING DT.23.10.2000

EXT.P7 – TRUE COPY OF THE WHIP ISSUED BY PETR. ON 3.12.04.

EXT.P8 – TRUE COPY OF NOTICE ISSUED TO CALL MEETING BY SECRETARY

EXT.P9 – TRUE COPY OF NOTICE ISSUED BY KALAMASSERY MUNICIPALITY DT.25.11.2004.

EXT.P10 – TRUE COPY OF WRITTEN DIRECTION DT.3.1.05.

EXT.P11 – TRUE COPY OF LETTER BY KPCC CHAIRMAN DT.24.3.03.

EXT.P12 – TRUE COPY OF LETTER ISSUED BY DCC PRESIDENT DT.5.12.04.

EXT.P13 – TRUE COPY OF THE MINUTES OF THE MEETING WITH THE SIGNATURE OF M.B.PRAKASH HELD ON 16.12.04

EXT.P14 – TRUE COPY OF THE POSTAL ACKNOWLEDGMENT DT.4.12.2004.

/TRUE COPY/

PIUS C. KURIAKOSE, J.

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W.P.(C) No.34626 OF 2006

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DATED THIS THE 9TH JANUARY, 2007

J U D G M E N T

A sitting Councillor from Ward No.25 of the Kalamssery Municipality is the petitioner. He was a member of the previous Council representing Ward No.20 and was elected as Chairman of the Municipality by the previous Council. The 1st respondent is the Councillor representing Ward No.20 of the Kalamassery Municipality. The petitioner states that in respect of the petitioner's activities as Councillor from Ward No.20 in the previous Council, the 1st respondent has filed O.P.No.174 of 2004 before the 2nd respondent-State Election Commission praying for a declaration that the petitioner is disqualified on the ground of defection alleged to have been committed on 6.12.2004. Ext.P1 is copy of that O.P. The 2nd respondent has on 19.12.2006 passed orders allowing Ext.P1 and declaring the petitioner as disqualified on the ground of defection. The petitioner contends that Ext.P2 is an ex parte order. The petitioner had engaged Advocate Sri.C.Jayachandran of Thiruvananthapuram Bar to appear for him before the Election Commission and to conduct the case on his behalf by executing vakalathnama. The documents in support of the defence were also entrusted to the advocate. The petitioner had been

contacting the advocate for finding out the developments in the case. But the advocate continued to inform the petitioner that the case has not been posted at all and that as and when posting is made, the petitioner will be informed.. It was only from the newspaper columns that the petitioner came to know that the 2nd respondent has passed Ext.P2 order disposing of Ext.P1 case. As soon as the petitioner came to know about Ext.P2, he submitted Ext.P3 application for setting aside the ex parte order. A request for stay of the operation of Ext.P2 was also made by the petitioner. But the 2nd respondent is yet to take any decision on Ext.P3. The petitioner claims that it was he who was elected as the leader of the Parliamentary Party of the UDF in the meeting of the elected Councillors of UDF held on 5.10.2000. Ext.P4 is copy of the letter issued to the Secretary of the Municipality by the petitioner in that context. The UDF Parliamentary Party has 18 members and Ext.P5 is copy of the minutes of the meeting of the UDF Parliamentary Party held on 5.10.2000 which was attended by 17 members. Ext.P6 is copy of the minutes of another meeting of the UDF Parliamentary Party held on 23.10.2000. Ext.P6 will show that the said meeting was attended by all 18 members. Ext.P7 is copy of the whip of the Parliamentary party issued by the petitioner regarding

the election of Chairman proposed to be held on 6.12.2004. Ext.P8 is copy of the notice issued by the petitioner along with the Secretary of the UDF Parliamentary Party to its members regarding a meeting to be held on 1.12.2004. Ext.P9 is copy of the notice issued by the Returning Officer for election of Chairman of the Kalamassery Municipality to all candidates for a meeting to elect a Chairman on 6.12.2004. Even after the disputed election on 6.12.2004, the petitioner claims to have continued as UDF Parliamentary Leader and whip. Ext.P10 is copy of the whip dated 3.1.2005 given in respect of a no-confidence motion against the then Standing Committee Chairman and in favour of UDF Councillor Smt.Chandrika Padmanabhan. Ext.P10 issued by the petitioner, it is pointed out, has been accepted by the concerned UDF Councillors and this will be clear from the minutes of the Municipal Council in respect of the meeting of 6.1.2005 when the no-confidence motion was deliberated. Ext.P11 copy of letter issued by the Kerala Pradesh Congress Committee to the DCC President is relied on by the petitioner to show that the KPCC had recognised him as Parliamentary Party leader and whip of the Congress Party in the Kalamassery Municipal Council. Raising several grounds, the petitioner prays in this Writ Petition that Ext.P2 order be set aside and

he be given an opportunity to contest Ext.P1 case. It is also prayed that the 2nd respondent-Election Commission be directed to consider and dispose of Ext.P3 within a short time.

2. A very detailed counter affidavit has been filed by the 1st respondent denying all the claims and contentions of the writ petitioner. It is stated that O.P.174 of 2004 was filed on 20.12.2004 and notice was issued to the petitioner. On 7.1.2005 the O.P. stood posted for appearance of the petitioner (respondent therein) and he made appearance through counsel on that day. Thereafter, there were several proceedings and the petitioner never cared to prosecute the matter seriously. Only when the order adversely affected the petitioner has the petitioner thought in terms of prosecuting the matter and somehow obtain a stay. It is further contended that he filed petitions before the 2nd respondent as O.P.164 to 169 of 2004 against the 1st respondent and others on the ground that the 1st respondent has defied the whip and the 1st respondent and others have entailed disqualification on the ground of defection. The petitioner never cared to prosecute the cases filed by him while the 1st respondent was seriously prosecuting both the matters and was properly represented on all posting dates incurring heavy expenses.

The impugned order in O.P.174 of 2004 was passed after a lapse of two years. The version of the petitioner that his counsel did not appear and he did not know about the non-appearance of his counsel is unbelievable. It is lastly contended that this Court will not be justified in exercising the powers under Article 226 of the Constitution to set aside an order of the election Commission, which being one based on evidence and materials cannot be said to be faulty. All the grounds raised in the Writ Petition centers around disputed questions of fact which cannot be resolved by this Court. It is not even urged that the order of the Election Commission suffers from any jurisdictional error in which case only this Court will be justified in intervening.

3. Refuting the contentions in the counter affidavit and producing additional documents Exts.P13 and P14, the petitioner has filed a reply affidavit..

4. Heard Sri.K.Jagadeesachandran Nair, learned counsel for the petitioner and Sri.K.Ramakumar, learned counsel for the contesting 1st respondent. I have also heard Sri.Murali Purushothaman, learned Standing Counsel for the 2nd respondent-Election Commission and Sri.M.K.Aboobacker, learned counsel for the Municipality.

5. The emphatic objections and persuasive submissions of Sri.K.Ramakumar notwithstanding, I am not inclined to hold that this Writ Petition is liable to be dismissed in limine. After all, Ext.P3 application has been filed by the petitioner under Order IX Rule 13 CPC for setting aside Ext.P2 order. Though Ext.P2 order purports to be one on merits also, the fact remains that the same has been passed after setting the petitioner ex parte. May be, the 1st respondent is right in contending that there are no good reasons for setting aside that ex parte order. But this is a matter to be decided by the Election Commission on Ext.P3. Since Ext.P3 is pending before the Election Commission, I dispose of the Writ Petition directing the Election Commission to dispose of Ext.P3 within two months of receiving copy of this judgment. In fact, the Standing Counsel for the Election Commission assured me that the Commission will be able to dispose of the matter even before the expiry of two months. In view of the above submission, there will be a further direction that till such time as Ext.P3 is disposed of, Ext.P2, in so far as the same relates to the writ petitioner, will be kept in abeyance. I make it clear that I have not expressed any opinion on the grantability of Ext.P3 application and that decision will be taken on that application by the Election

Commission on its merfits, taking into account the considerations which normally weigh with courts while deciding applications to set aside ex parte orders or decrees.

(PIUS C. KURIAKOSE, JUDGE)

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MCA No.180 of 2006
This application has been submitted by the North Malabar Gramin Bank seeking a direction to the 1st respondent-Official Liquidator to withdraw the amount of Rs.2,11,25,000/- deposited in the Bank of Maharashtra pursuant to the order dated 18.10.2006 in Report No.1 in General Report No.1011 and to deposit the same in the applicant-Bank for a period of 181 days and for a further direction to the Official Liquidator to strictly comply with the order dated 17.5.2005 in C.A.No.136 of 2005 in C.P.No.1 of 1996 in the matter of deposit of surplus funds of various companies in liquidation.
2. In the affidavit sworn to by the Area Manager of the applicant-bank, it is stated that the bank is a Regional Rural Bank established by the Government of India in exercise of the powers under Section 3(1) of the Regional Rural Banks Act, 1976. Pursuant to the notification issued by the Reserve Bank of India, the applicant-bank stands included in the Second Schedule of the Reserve Bank of India Act, 1934. It is highlighted that the applicant has a paid up share capital of Rs.100 lakhs contributed by the Government of India, the Syndicate Bank and the Government of Kerala in the ratio 50: 35: 15. Thus, for all practical purposes, the applicant is a bank wholly owned by Governments. The applicant is a profit making bank with 159 branches and 3 extension counters commanding considerable volume of business in six districts of Kerala including Ernakulam District. As per the latest balance sheet, the applicant-bank has reserves and surpluses of over Rs.122 crores and deposits in excess of Rs.890 crores. The financial position of the applicant-bank is exceptionally sound, as will be clear from the fact that the applicant-bank is the only one among the two regional banks from out of 196 in the country which did not take any additional capacity as part of capitalisation programme of the Government. The applicant relies on Annexure-A Government of India's letter, Annexure-B Kerala Government Order and Annexure-C Kerala Government Circular to contend that the applicant is a public sector bank at par with Nationalised Banks and

that the Governments actually encourage deposit in Regional Rural Banks like the applicant-bank. It is accordingly contended that deposit of surplus funds by the Official Liquidator in the applicant-bank will not violate Section 553 and Section 554 of the Companies Act. The Official Liquidator is however showing reluctance to deposit amounts with the applicant-bank. Annexure-D communication dated 10.1.2005 was issued by the Official Liquidator to the applicant-bank wherein it is stated that the Official Liquidator is making deposit of surplus funds in Nationalised Banks only on the basis of the orders of this Court and the guidelines issued by the Ministry of Company Affairs, New Delhi and therefore he will not be in a position to accede to the request of the applicant to make deposits in their bank. Aggrieved by Annexure-D, the applicant filed an application under Rule 293 of the Companies (Court) Rules, 1959 seeking a direction to the Official Liquidator to deposit surplus funds in the applicant-bank and to empanel the applicant among the banks qualified to receive deposits of surplus funds of companies in liquidation. In that application the Official Liquidator filed Annexure-E counter statement in which it had been prominently contended that the claim of ICICI Bank Ltd. for empanelment had been rejected by this Court. The affidavit points out that this Court overruled the contentions and granted permission for empanelment of the applicant-bank in exercise of its jurisdiction under Rule 293 of the Companies (Court) Rules, 1959. Pursuant to that order, the applicant was empanelled and quotations were invited as and when surplus funds were available. As may as 121 deposits were made by the Official Liquidator with the applicant-bank. All those deposits were sanctioned by this Court and those deposits were made on the basis of the highest rates of interest quoted by the applicant. Whenever deposits were closed or matured, the applicant promptly made repayment of the amounts to the Official Liquidator. The conduct of the applicant-bank in the matter of deposits made by the Official Liquidator was exceptional and did not given any room for any complaint. The applicant then states that Annexure-F General Report No.1011 dated 9.10.2006 was filed before this Court by the Official Liquidator. In Annexure-F permission of this Court was sought for depositing amounts in the bank offering highest rate of interest. The highest rate was offered by the applicant bank at 8.60% per annum. The second highest was the offer made by the State Bank of Maharashtra at a rate of 8.10% only. Annexure-G is produced by the applicant in this context. Even though the Official Liquidator was

bound to deposit the amount with the applicant-bank, he filed Annexure-H further report stating that the appeal arising from the judgment in the matter of ICICI Bank has been dismissed and therefore it would not be proper to deposit amounts with the applicant-bank. The Official Liquidator did not even make the applicant a party to the proceedings though several contentions were taken in that report against the applicant. This Court accepted the suggestion made by the Official Liquidator and directed deposit to be made in the Bank of Maharashtra. Annexure-I is copy of the order passed by this Court. The said order, the affidavit states, is illegal and vitiated by errors of fact, law and jurisdiction apparent on the face of the record. The order of this Court in C.A.136 of 2005 in C.P.1 of 1996 has become final. Permission granted to the applicant under rule 293 of the Companies (Court) Rules is final and subsisting. The rate quoted by the applicant being the highest was bound to be accepted and deposit could have been made only with the applicant. The Official Liquidator has made an unfortunate attempt to confuse matters and to resurrect the arguments which were once rejected by this Court. After Annexure-I order, the Official Liquidator has stopped inviting quotations for deposit of surplus amounts. Annexure-I order has been obtained behind the bank of the applicant and the applicant is now being excluded from submitting bids.

3. A detailed counter affidavit has been filed by the Official Liquidator denying the averments in the affidavit in support of the application. The locus standi of the applicant-bank to file application itself is questioned. It is pointed out that the applicant does not have a case that assets secured to it have been sold and proceeds are going to be deposited with some other banks. Various banks and institutions are creditors of various companies in liquidation and if at all an application in the instant nature is to be considered, such application should be filed by those banks and institutions which were secured creditors in respect of the companies in liquidation. It is then contended that no statutory or fundamental right of the applicant has been infringed by directing the Official Liquidator to make further investment of surplus in Nationalised banks in conformity with the judgment of the Division Bench in ICICI Bank's case. Nothing makes it obligatory on the part of the Company Court to make such investment of surplus funds in non-Nationalised banks as that of the applicant herein in which case alone the applicant can complain that it has been discriminated. In the instant case, the Company Court has exercised discretion in favour of

Nationalised banks and the applicant is not a Nationalised bank. The Official Liquidator had not actually been inviting any tender from any non-Nationalised bank except the applicant-bank. Quotations were invited from the applicant-bank because of the order dated 17.5.2005 in C.A.136 of 2005 in C.P.1 of 1996. Once the door was opened to the applicant-bank, all the deposits were cornered by them and the Nationalised banks were at a disadvantage. At a point of time, out of the total deposits of Rs.25 crores, as high as Rs.21 crores were invested with the applicant-bank. This was an alarming situation. The applicant-bank is not a Nationalised bank and cannot be empanelled along with Nationalised banks. It is then contended that along with Report 1 in General Report No.1011 the Official Liquidator had produced copy of order dated 23.12.2005 passed by the Division Bench of this Court in W.A.No.470 of 2004 touching upon the investment of surplus funds, filed by the ICICI Bank. It was after considering that order, this Court passed the impugned order. The safety and security of the deposit was the prima concern which prompted this Court to invest such amounts with Nationalised banks, ignoring the slightly higher rate of interest which could have been fetched had it been deposited with Scheduled Banks like the applicant-bank.

4. The following points are highlighted in the counter affidavit:

1. The applicant bank is a non-Nationalised bank sponsored by one of the Nationalised Banks, viz., the Syndicate Bank.

2. Being a non-Nationalised bank, the applicant has more functional freedom and elasticity in offering interest for canvassing deposits which enable it to compete with Nationalised banks and secure deposits by offering highest rate But Nationalised banks functioning under the rigid control and supervision of the Reserve Bank of India cannot be expected to have such functional freedom and elasticity. It is therefore not proper to allow the applicant-bank to take part in the quotation of deposits along with Nationalised banks. The applicant which is a Scheduled bank cannot claim any advantage over nationalized banks.

3. The funds to be deposited by the Official Liquidator actually belong to creditors of ill-fated companies. The paramount consideration while investing those funds should be that of safety. Deposits in Nationalised banks will be the safest.

4. The lion share of the deposits made by the Official Liquidator, i.e., Rs.21 crores out of Rs.25 crores is now with the applicant-bank. It

will not be advisable to keep all the investments in a particular bank especially non-nationalised bank at a particular point of time which is against the policy of the Ministry of Company Affairs.

5. Rule 293 confers exclusive and discretionary right on the Company Court and it is highly improper for the applicant-bank to request the Company Court to cancel the order which has been passed in exercise of discretion.

5. I have heard the submissions of Sri.P.B.Krishnan, learned counsel for the applicant-Bank and also those Sri.K.Moni, learned Standing Counsel for the Official Liquidator. Elaborate submissions were addressed before me by the respective counsel on the basis of the pleadings and my attention was drawn to the various annexures placed on record.

6. I find force in the submissions of Mr.Krishnan. Though it is true that applicant-bank is not a Nationalised bank, for all practical purposes it is a public sector bank. The financial position of the applicant-bank is very stable and its performance so far in the matter of deposits made by the Official Liquidator does not give any room for any complaint. The judgment of the Division Bench in the ICICI Bank's case, strongly relied on by the Official Liquidator, is distinguishable in favour of the applicant-bank. As far as the applicant is concerned, the order of the learned Company Judge dated 17.5.2005 in C.A.136 of 2005 in C.P. 1 of 1996 decides the issue in its favour. That order has attained finality and has been implemented also. The Official Liquidator was not justified in relying on the judgment of the Division Bench in W.A.470 of 2004 to deviate from the order in C.A.136 of 2005.

7. The force noticed in the submissions of Mr.Krishnan notwithstanding, I am not inclined to allow prayer No.1 in the application. The amounts presently lying in deposit with Bank of Maharashtra pursuant to order dated 18.10.2006 in Report No.1 in General Report No.1011 can continue to remain with that bank till its maturity. There will be a direction to the Official Liquidator to strictly comply with the order dated 17.5.2005 in C.A.No.136 of 2005 in C.P.No.1 of 1996 in the matter of deposit of surplus funds of various

companies in liquidation and the Official Liquidator shall not be influenced by the judgment in W.A.No.470 of 2004 when it comes to the question of making deposits with the applicant-bank.
The application stands allowed to the above extent, but in the circumstances without any order as to costs.

RP.

The Writ Petition is filed by candidates who were rank-listed at numbers 4, 5, 19 and 25 by the P.S.C. for appointment to the post of Lecturer in Anatomy (non-medical) in the Medical Education Department. Ext.P1 is copy of the ranked list. The petitioners state that there were 6 notified vacancies at the time of issuance of the P.S.C. notification and the same were duly reported by the Head of the Department, the 2nd respondent-Director to the 3rd respondent-P.S.C. Subsequently, as per file No.G3/24210/04/DME of July, 2004 another 6 vacancies were also reported to the 3rd respondent for advice. The grievance of the petitioners is that though 12 vacancies of Anatomy Lecturer (non-medical) were reported to the P.S.C., only 6 vacancies have been filled up with candidates from the ranked list and the 6 vacancies reported in July, 2004 are yet to be advised by the P.S.C. Petitioners have produced Ext.P2 copy of G.O.(P)455/76/Health dated 22.12.1976 providing revised qualifications for appointment to the post of Lecturer in Anatomy. As far as non-medical teachers are

concerned, it is provided in Ext.P2 that 30% of the total number of posts in the Department is reserved for them and what is insisted is possession of approved post-graduate qualification in the subject. All the petitioners being post-graduates in the subject Anatomy are qualified for being appointed. It is on that basis that applications were invited by the P.S.C. and the petitioners responded; interview conducted and list published. The petitioners claim that they are qualified for being appointed under the 30% quota reserved for non-medical lecturers in the subject-Anatomy.

(PIUS C. KURIAKOSE, JUDGE)

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